

After reviewing the record and considering the evidence, the Appeals Board concludes the Order of July 24, 2000, should be affirmed.

Claimant seeks benefits for bilateral upper extremity injuries she contends resulted from her repetitive work activities for respondent. On May 23, 2000, the ALJ entered a preliminary Order granting claimant medical treatment and temporary total disability benefits. The temporary total benefits were to be paid from January 21, 2000:

. . . until Claimant is released to return to work, and has been offered accommodated work within temporary work restrictions, or has attained MMI.

Claimant thereafter received medical treatment from Dr. James Ray Larzalere. On October 12, 1999, Dr. Larzalere determined claimant had reached maximum medical improvement and released claimant from his care. His notes from that date state:

She's reached maximum medical benefit. Basically she is not physically capable of hard labor and understands this. Put her on permanent light duty at work. If she has trouble or has considerable pain and need [sic] medications she needs to either get a different job or apply for a permanent disability for this and get a permanent disability rating. She is released from my care at this time. She has reached maximum medical benefit.

After the release by Dr. Larzalere, respondent terminated claimant's temporary total disability benefits. Respondent contends it did so because claimant refused respondent's offer for light duty work within the restrictions of Dr. Larzalere. Claimant, on the other hand, contends respondent terminated claimant at this time without offering accommodation.

Claimant then filed a demand for payment of the temporary total disability benefits and ultimately requested penalties. Respondent, on the other hand, filed an Application for Preliminary Hearing, seeking a ruling that it did not owe temporary total disability benefits.

A preliminary hearing was held July 19, 2000, to consider both claimant's request for penalties and to determine whether respondent owed temporary total disability benefits. The parties offered medical records and testimony regarding whether respondent had offered claimant employment within the light duty restrictions. The medical record included reports from Dr. C. Reiff Brown and Dr. Amayo, both suggesting claimant needs further treatment. The parties provided significantly different testimony about how respondent reacted to the work limitation. Claimant testified that respondent simply terminated claimant. Respondent, on the other hand, offers evidence that it offered light duty employment and claimant declined the offer.

Based on the evidence presented for the July 19, 2000 hearing, the ALJ ruled that temporary total disability benefits were properly terminated when Dr. Larzalere released claimant October 12, 1999. The ALJ further ruled, however, based on Dr. Amayo's report, that claimant now again meets the definition of temporary total disability and ordered temporary benefits to begin again until claimant is offered accommodated work or has attained maximum medical improvement. The ALJ denied claimant's request for penalties

stating that a legal issue was presented as to whether respondent should be liable for temporary total disability benefits once claimant was released by Dr. Larzalere. The ALJ stated the rationale as follows:

As Respondent's liability for TTD benefits required resolution of the legal issue of Claimant's entitlement under the circumstances presented, the Court does not feel assessment of penalties is appropriate.

Claimant contends she is entitled to temporary total disability benefits from the time claimant left work for respondent and continuing to date. According to claimant, respondent offered no appropriate accommodated work and the release by Dr. Larzalere should not operate to terminate temporary total disability. Claimant points to the fact that the ALJ now says claimant is not at maximum medical improvement as evidence that claimant was not truly at maximum medical improvement when earlier released by Dr. Larzalere.

The Board concludes it does not have jurisdiction to determine or review the ALJ's determination regarding the period for temporary total disability benefits. The Board has limited jurisdiction on appeals from preliminary hearing orders. The Board is limited to review of jurisdictional issues. K.S.A. 44-534a and K.S.A. 44-551. The ALJ does have jurisdiction to determine whether claimant is or is not temporarily and totally disabled. Whether the Board agrees or disagrees, the ALJ has that jurisdiction and the determination is not subject to review except as part of the review of the final award.

The Board also concludes that penalties should be denied, but the Board does so for slightly different reasons than those given by the ALJ. The ALJ's Order suggests that penalties should be denied because the circumstances present a legal issue regarding claimant's right to temporary total disability benefits. The Board does not consider the existence of a legal issue to be justification for terminating ordered benefits. The question is, in our view, whether the order for benefits was still in effect once Dr. Larzalere released claimant.

In this case, the ALJ ordered benefits to be paid until one of several conditions occurred, either claimant was released to return to work, respondent offered accommodated employment, or claimant reached maximum medical improvement. Respondent chose without further order to terminate the benefits once Dr. Larzalere released claimant. In our view, respondent is not excused from penalties by virtue of a good faith belief there is a legitimate issue about its obligation. Respondent had the option of asking for a preliminary hearing to obtain a ruling on its obligation. Instead, respondent terminated the benefits and only asked for a hearing once claimant sought penalties. In the Board's view, respondent did so at its own risk. If they were wrong, even though in good faith, penalties would be appropriate.

In this case, the Board concludes respondent was correct. Claimant had, according to the authorized treating physician, reached maximum medical improvement. In our view,

an order for benefits to be paid until claimant reaches maximum medical improvement is an order that benefits be paid until the authorized treating physician determines that claimant has reached maximum medical improvement. The authorized treating physician, Dr. Larzalere, had, in this case, concluded claimant was at maximum medical improvement and temporary total disability benefits were no longer owed under the preliminary hearing Order of May 23, 2000. Claimant's request for penalties for failure to pay pursuant to that Order must be denied.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore on July 24, 2000, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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c: Roger A. Riedmiller, Wichita, KS  
Jeffrey E. King, Salina, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director